

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. JOHNSON

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLEE,
V.
SCOTT D. JOHNSON, APPELLANT.

Filed March 20, 2012. No. A-11-284.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge.
Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.
Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.
IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Scott D. Johnson appeals an order of the district court for Lancaster County, Nebraska, denying Johnson's motion for absolute discharge on the basis of alleged statutory and constitutional speedy trial violations. On appeal, Johnson argues that the district court erred in failing to include the time during which a complaint and an amended complaint were pending in county court prior to the information being filed in district court in its calculations of whether his right to a speedy trial was violated. Upon our review of the record, we find no merit to Johnson's assertions that the district court erred in its calculations of the speedy trial time or in denying his motion for discharge. We affirm.

II. BACKGROUND

The relevant factual matters in this appeal concern the dates of various filings, motions, and rulings thereon. As such, we confine our recitation of the background to a brief description of the pertinent procedural history surrounding the case.

On March 22, 2010, the State filed a criminal complaint in Lancaster County Court charging Johnson with third degree assault, a Class I misdemeanor. Three months later, on June 22, the State asked the court for leave to file an amended complaint. The amended complaint contained one charge only; that charge was second degree assault, a Class III felony. The court granted the State's request and indicated that "the Amended Complaint is filed." Johnson was then arraigned on the charge of second degree assault, which charge stemmed from the same set of circumstances as the original misdemeanor charge of third degree assault.

On August 19, 2010, Johnson waived his preliminary hearing and the case was bound over to district court. On September 3, an information was filed in Lancaster County District Court charging Johnson with second degree assault, a Class III felony, and with third degree assault, a Class I misdemeanor. Both charges stemmed from the same set of circumstances and involved the same victim and the same period of time.

On November 5, 2010, the State filed a motion to continue the trial which had been set to begin during the November 8 jury term. In the affidavit attached to the State's motion, the State alleged that the victim in the case was unavailable to testify at the scheduled trial because she was undergoing treatment for brain cancer. On November 8, the district court sustained the State's motion to continue over Johnson's objection. In addition, at that time, the district court indicated it was declining to make any specific finding concerning whether good cause had been shown. The trial was continued to the January 3, 2011, jury term.

On December 30, 2010, Johnson filed a motion to discharge. In the motion, he alleged that his statutory and constitutional right to a speedy trial had been violated. On February 3, 2011, a hearing was held on Johnson's motion to discharge.

On April 4, 2011, the district court entered an order denying Johnson's motion to discharge. Johnson appeals from that order here.

III. ASSIGNMENT OF ERROR

Johnson's only assignment of error is that the district court erred in failing to grant his motion to discharge that was based on a violation of his statutory right to a speedy trial pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 2008). Johnson does not assert a violation of his constitutional right to a speedy trial.

IV. ANALYSIS

1. STANDARD OF REVIEW

As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010); *State v. Vela-Montes*, 19 Neb. App. 378, 807 N.W.2d 544 (2011).

2. STATUTORY RIGHT TO SPEEDY TRIAL

Section 29-1207 provides that every person charged for any offense shall be brought to trial within 6 months of the day the information is filed. Section 29-1207 also provides for certain periods of time that are excludable in computing the 6-month limitation, such as the period of delay resulting from a continuance granted at the request of the State when evidence material to the State's case is unavailable, but will be available at a later date. Neb. Rev. Stat. § 29-1208 (Reissue 2008) provides:

If a defendant is not brought to trial before the running of the time for trial as provided for in section 29-1207, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.

The final trial date under § 29-1207 is determined by excluding the date the information was filed, counting forward 6 months, backing up 1 day, and then adding the excludable time periods to that date. See *State v. Timmerman*, 12 Neb. App. 934, 687 N.W.2d 24 (2004). Although § 29-1207 expressly refers to indictments and informations, the act also applies to prosecutions on complaint. See *State v. Timmerman*, *supra*. In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed. *Id.*

(a) Misdemeanor Offense

We first address the speedy trial calculation for the misdemeanor offense of third degree assault charged in the information. Johnson argues that the time for calculating his right to speedy trial commenced on March 22, 2010, when the original complaint charging him with third degree assault was filed in county court, and continued to run uninterrupted through December 30, when he filed his motion to discharge. He further asserts that because the district court failed to include all of the time from March 22 through December 30 in its speedy trial calculation, the court erred in denying his motion to discharge.

Upon our review, we conclude that the misdemeanor charge speedy trial clock was tolled between the time the State filed the amended complaint on June 22, 2010, and the time the State filed the information on September 3. Furthermore, we decline to address whether the time the initial complaint was pending should be added to the speedy trial calculation, because even if such time period was included, the 6-month time period would not have expired on December 30, when Johnson filed his motion to discharge.

The September 3, 2010, information charged Johnson with the misdemeanor assault charge as well as with one count of felony assault. Therefore, if there were no excludable periods, the last day to bring Johnson to trial on both charges, the felony and the misdemeanor, would have been March 3, 2011.

In the district court's order denying Johnson's motion to discharge, it found that the period of time after November 8, 2010, when the court granted the State's motion to continue the trial on the felony and misdemeanor charges, should be excluded from the speedy trial calculation. Although Johnson argues in his brief to this court that the district court erred in excluding such time because the State failed to convincingly demonstrate that the victim was

unavailable to testify at the November 2010 trial, he did not assign this assertion as error. We therefore do not address Johnson's argument regarding the district court's finding that the period of time after November 8 was excludable from the speedy trial calculation because of the established principle that errors which are argued but not assigned will not be considered on appeal. See *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

When we exclude the time period from November 8 through December 30, 2010, when Johnson filed his motion to discharge, we conclude that 53 days should be added to the speedy trial clock. As such, the last day to bring Johnson to trial would have been April 25, 2011.

On appeal, Johnson argues that the time to bring him to trial on the misdemeanor charge should be reduced by the time the complaint and the amended complaint were pending in county court. He asserts that when this period of time is added to the time the information was pending in district court, more than 6 months had passed since he was initially charged and he was entitled to absolute discharge.

Johnson's assertion with regard to the time period beginning when the amended complaint was filed on June 22, 2010, through the time the information was filed on September 3 is without merit. The amended complaint charged Johnson with second degree assault, a Class III felony. The misdemeanor charge of third degree assault was not included in the amended complaint. As a result, this period of time should not be included in the speedy trial calculation for the misdemeanor charge.

In *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991), the Nebraska Supreme Court held that although the speedy trial clock begins to run at the time of filing an information in district court, the speedy trial clock stops, or is tolled, during the time period between the State's dismissal of an initial information and the refile of an information charging the defendant with the same crime alleged in the previous, but dismissed, information. When we apply this rule to the facts of this case, we conclude that the time period between the State's filing of the amended complaint on June 22, 2010, and the State's filing of the information on September 3 should not be included in the speedy trial calculation. The State dismissed the misdemeanor assault charge when it filed the amended complaint and did not refile the misdemeanor charge until it filed the information in district court. The speedy trial clock was tolled during this time.

Johnson also alleges that the time the initial complaint was pending in county court should be included in the speedy trial calculation. The initial complaint was filed on March 22, 2010, and the amended complaint was filed on June 22. As such, the initial complaint was pending for 3 months. Even if we were to assume that such time should be included, the speedy trial time would not yet have expired when Johnson filed his motion to discharge. Therefore, we decline to decide whether this period of time should be included in the speedy trial calculation.

The information was filed in district court on September 3, 2010. As we discussed above, the time between the district court's granting the State's motion to continue on November 8, 2010, and the time Johnson filed his motion to discharge is excluded from the speedy trial time. Accordingly, the information was pending in district court for a little over 2 months. If we were to add the 3 months the initial complaint was pending in county court to the time the information was pending in district court, it is clear that the 6-month speedy trial clock has not yet expired.

Based on the date of the filing of the information in district court and the excludable time period after the court granted the State's motion to continue, we calculated the last date to bring

Johnson to trial as April 25, 2011. If we subtract 3 months from that calculation, we conclude that the State had until January 25 to bring Johnson to trial. As such, when Johnson filed his motion to discharge on December 30, 2010, there were still at least 25 days to bring Johnson to trial. We conclude that the district court was not clearly erroneous in denying Johnson's motion to discharge as to the misdemeanor offense of third degree assault.

(b) Felony Offense

We next address the speedy trial calculation for the felony offense of second degree assault charged in the information. In his brief on appeal, Johnson makes the same argument with regard to the felony offense as he does with regard to the misdemeanor offense. He asserts that the time for calculating his right to speedy trial commenced on March 22, 2010, when the original complaint was filed in county court and continued to run uninterrupted through December 30, when he filed his motion for discharge. He also asserts that because the district court failed to include all of the time from March 22 through December 30 in its speedy trial calculation, the court erred in denying his motion to discharge.

We find that Johnson's assertion has no merit. Based on a plain reading of existing authority, we conclude that the district court was correct in denying the motion to discharge as to the felony offense of second degree assault. The speedy trial clock did not begin running until the information was filed in September 2010, approximately 4 months prior to Johnson's filing his motion to discharge.

When considering felony offenses, it is well established that the statutory 6-month speedy trial period commences to run from the date the information is filed in district court and not from the time a complaint is filed in county court. See, *State v. Blakeman*, 16 Neb. App. 362, 744 N.W.2d 717 (2008); *State v. Hutton*, 11 Neb. App. 286, 648 N.W.2d 322 (2002). In *State v. Blakeman*, *supra*, this court applied that rule to a situation where a complaint filed in county court initially charged a misdemeanor driving under the influence offense and various traffic infractions. An amended complaint was later filed charging two felony offenses in addition to the misdemeanor offenses and infractions. *Id.* In that situation, we concluded that the speedy trial clock did not begin to run until an information was eventually filed in district court, and none of the time that any of the complaints was pending in county court was included in calculating the 6-month speedy trial time. *Id.*

In the instant case, the information charging Johnson with the felony offense of second degree assault was filed on September 3, 2010. The fact that Johnson was previously charged with assault in the third degree, a misdemeanor, in the initial complaint is comparable to the fact that the defendant in *State v. Blakeman*, *supra*, was, for a time, charged with misdemeanor offenses and infractions instead of a felony offense. Just as we did in *State v. Blakeman*, we conclude that the clock did not start to run until the information was filed in district court, regardless of what charges were alleged in the previous complaints filed in county court.

Because we conclude that the speedy trial clock did not begin to run with respect to the felony offense of second degree assault until the information was filed in district court on September 3, 2010, Johnson's motion to discharge filed on December 30 only came approximately 4 months after the clock began to run. In addition, as we discussed above, the time after the district court granted the State's motion to continue on November 8 through the

time Johnson filed his motion to discharge on December 30 is excluded from the speedy trial calculation. As a result, only a little over 2 months had passed on the speedy trial clock when Johnson filed his motion to discharge and the State had approximately 4 more months to bring Johnson to trial on the felony assault charge. We conclude that the district court did not err in finding that the motion to discharge should be denied with respect to the felony offense of second degree assault.

V. CONCLUSION

We find that Johnson's assertions on appeal have no merit. With respect to the misdemeanor offense, the speedy trial clock was tolled between the time the State filed the amended complaint and the time the State filed the information. We decline to address whether the time the initial complaint was pending should be added to the speedy trial calculation, because even if such time period was included, the 6-month time period would not have expired on December 30, 2010, when Johnson filed his motion to discharge. With respect to the felony offense, we find Johnson's request to include the time the complaint and amended complaint were pending in county court directly contrary to established law. We affirm.

AFFIRMED.